

Comments of the Environmental Defense Fund on the Third Staff Draft Delta Plan
Submitted by Cynthia Koehler, California Water Legislative Director (May 11, 2011)

Introduction

The Third Staff Draft Delta Plan (“Draft”) is an impressive effort that overall gives effect to the Legislature’s direction in the Delta Reform Act of 2009 (section numbers below refer to the Act unless otherwise noted). Given limited time, these comments cover only a small number of issues of interest to EDF. As indicated in several places below, we intend to submit more detailed comments shortly.

Covered Actions

The Draft appears to strike an appropriate balance between the Council’s responsibility to ensure consistency with the Delta Plan and the statute’s respect for retaining the regulatory authority of existing agencies. See generally Sec. 85031. In Section 85057.5, the Legislature set forth a detailed and explicit discussion about the actions that are covered for purposes of the Council’s consistency authority. Figure 3.1 is a particularly helpful graphic. The Draft is notable for its fidelity to the Legislature’s vision in this regard.

We concur with the Draft that a covered action should be consistent with the Delta Plan not only at the time of certification, but also through implementation. (Draft at 39) Any other approach would undermine the purpose of the Council’s consistency review.

The policies set forth at pages 39-40 appear to be well within the Council’s legal authority pursuant to the Delta Reform Act. As indicated in my oral remarks in recent testimony, the Delta Reform Act’s savings clause makes it clear that the Legislature did not intend the Council to be a “super-agency,” superseding the regulatory of existing agencies under other statutory schemes. The Act clearly did intend to establish in the Council a new consistency review authority to ensure that actions taken by various entities that affect the Delta region are coordinated and implemented in a coherent and integrated manner. See Sec. 85225 et seq. This is the primary regulatory power delegated to the Council and, among other things, gives effect to the Legislature’s intention to “establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.” Sec. 85001(c). See also Sec. 85020(h) (establishing state policy to “[e]stablish a new governance structure with the authority, responsibility, accountability, scientific support and adequate and secure funding to achieve these objectives.”) Against this clear Legislative direction for the Council, as this new governance structure, to craft a comprehensive plan that coordinates and synthesizes the myriad planning efforts that affect the Delta, the Draft’s covered action policies are appropriate.

The Draft indicates that further discussion will take place with regard to the notion of “best available science.” This is a key opportunity for the Council to provide much needed guidance with regard to an oft-used phrase that does not impart a consistent meaning. Per our prior remarks on this subject, we recommend that the Council consider adopting a definition of best available science consistent with the statute and NAS recommendations to clarify that “best” is not synonymous with “certain,” since certainty is in most cases an impossible standard and is in any event not the standard of information or evidence required by law for purposes of supporting public policy decision making.

We particularly commend the Draft for its focus on assuring that covered actions are implemented such that they achieve their “desired results.” This is a critical point if the Delta Plan is to be successful. The statute expressly directs the Council to include performance measures to enable it to track and assure performance of its objectives. This is a key function that has been lacking in other efforts to “fix the Delta,” and we recommend that the next draft address this mandate in greater detail.

Incorporation of BDCP into Delta Plan

The Draft indicates that the BDCP may be incorporated into the Delta Plan if it meets specified conditions. (Draft at 40.) We concur with this and with the observation that BDCP implementation is not equivalent to satisfying the Delta Reform Act. The relationship between BDCP and the Delta Plan is extensively addressed in the Delta Reform Act; indeed an entire chapter is devoted to this issue. See Secs. 85320-85322. While the Draft devotes additional attention to this subject in the Ecosystem Restoration Chapter (Draft at 71-73), the Plan would benefit from a broader discussion of the relationship between the BDCP and the Delta Plan and the Council’s appropriate role. We will submit further detailed recommendations in this regard within the next week.

More Reliable Water Supply

In general, we concur with the water supply policies proposed at 49-51 of the Draft, and in particular the recognition that supply reliability is linked to the Delta Reform Act’s direction to reduce reliance on the Delta. See Sec. 85021. The proposed policies appear to be well within the Council’s authority to ensure that planning efforts meet the co-equal goals. We plan to submit additional technical comments and recommendations on this section shortly.

Delta Instream Flow Criteria

EDF concurs that it is essential that the SWRCB complete the work to set flow criteria for the Delta and major tributaries (Draft at 51). The proposed deadlines for this work set forth in the Draft appear to be reasonable, but it would be useful to know whether the Board and its staff have been consulted in this regard. Per the Delta Reform Act Section 85031, the State Board retains its full authority to determine appropriate flows and administration of the public trust and reasonable use doctrines. Moreover, while the objective of the Delta Plan is the implementation of the co-equal goals, the State Board’s mandate is to ensure, *inter alia*, that the waters of the state are beneficially used consistent with the Public Trust Doctrine, the

Reasonable Use Doctrine (Cal. Const. Art. 10, Sec. 2), and the statutory requirements of the Porter-Cologne Act. The Delta Reform Act reinforces this by providing that:

“The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” Sec. 85023.

Thus, we recommend that Policies WR P4 be modified to state that the State Board adopt and implement flow objectives necessary to give effect to the Public Trust Doctrine, Reasonable Use Doctrine and related statutory mandates. Pursuant to the Delta Reform Act, these longstanding doctrines and rules remain the appropriate framework for the State Board’s flow recommendations, not the Delta Reform Act itself which expressly preserved the State Board’s jurisdiction and mandate.

We concur with the Draft that the Delta Plan should establish a baseline from which to measure consistency with regard to flows. (Draft at 52) Each of the three “consequence” options listed in the Draft in the event that the Board does not timely adopt flow standards have merit. In light of prior findings that the system is over-allocated, the third option (recommending a temporary moratorium on water rights permits in the watershed until flow criteria are adopted) appears to be the most consistent with the Delta Reform Act.

Reporting and Transparency

We concur with the problem statement (Draft at 54) and the policy that consistency with the Delta Plan should require that export contracts be developed in a transparent manner.

Thank you for your consideration of these abbreviated comments. We look forward to working with the Council as its planning process moves forward.